IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 1ST DECEMBER 2006 / 10TH AGRAHAYANA 1928

CRL.A.No. 665 of 2002()

SC.64/2000 of III ADDL. SESSIONS COURT (ADHOC), FAST TRACK COURT NO.I,THRISSUR

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APPELLANT:

P.A.FRANCIS, AGED 58,
S/O. PUTHUR ANTHONY, P.O.PARAPPUR, THOLOOR VILLAGE, THRISSUR-680 552.

BY ADVS. SRI.P.K.ASHOKAN
SMT.S.JEEJABHAI

RESPONDENTCOMPLAINANT - STATE:

STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTORSRI. C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.P.NO.5593 OF 2002 IN CRL.APPEAL NO.665 OF 2002.

DISMISSED

1.12.2006 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 665 OF 2002

Dated this the 1st day of December, , 2006

JUDGMENT

The appellant is the accused in Sessions Case No.64 of 2000 on the file of the III Additional Sessions Court (Adhoc) Fast Track Court No.I, Thrissur. The appellant faced trial for the offence punishable under Section 55(a) and (i) of the Abkari Act.

2. The prosecution case against the appellant was that on 18.6.1997 at 8 P.M. while PW.4, the Sub Inspector of Police and PW.1, the Head Constable of Peramangalam Police Station were on patrol duty, they found the appellant in the property of Puthur Chakkunny keeping in possession Indian made foreign liquor in 11 full bottles of 180 ml. capacity and two empty bottles of 3.75 ml. and 180 ml. capacity. To prove the case against the appellant, the prosecution examined PWs.1 to 5 and produced Edxts.P1 to P5 as well as MOs.1 to 3. DW.1 was examined on the side of the defence, but no documents were produced. The appellant when questioned under Section 313 Cr.P.C. denied commission of any offence as alleged by the prosecution and stated that he was implicated by the police without any evidence. Relying on the oral and documentary

evidence adduced by the prosecution, the trial court found the appellant guilty under Section 55(a) and (i) of the Abkari Act and convicted him thereunder. He was sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months for the offence under Section 55(a) of the Abkari Act. The appellant was also sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/-and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months for the offence under Section 55(i) of the Abkari Act. The sentences were ordered to run concurrently. The benefit under Section 428 Cr.P.C. was also allowed. The above conviction and sentences are challenged in this appeal.

3. Heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor. Learned counsel for the appellant, Sri.P.K.Ashokan urged three grounds before this Court: (i) the prosecution case cannot be believed as there was discrepancy in the place of occurrence and the place of arrest, (ii) the prosecution failed to prove any sample having been taken after seizure of the contraband articles as per the provisions of the Abkari Act as there is contradiction in the evidence of PWs.1 and 4 and the excise Manual and (iii) the prosecution failed to adduce any legally acceptable evidence to show that the

contraband articles alleged to have been seized from the appellant were kept for sale so as to attract an offence under Section 55(i) of the Abkari Act.

4. The learned Public Prosecutor, on the other hand submits that the trial court appreciated the evidence adduced by the prosecution and also considered the presumption available under Section 64 of the Abkari Act and that the findings entered by the trial court are justifiable.

5. The prosecution tried to prove the case against the appellant through the direct evidence of PWs.1 to 4. PW.4, the detecting officer, deposed that on getting information about the sale of Indian made foreign liquor, he reached the scene of occurrence and saw the appellant at a distance of 50 metres away from Parappur junction standing near the shop of one Thomas (PW.3) with a plastic bag on his hand and on examining the bag he found 11 full bottles each containing 180 ml. of Time Brandy and also two empty bottles. PW.4 further deposed that he seized the contraband articles on preparing Ext.P1 seizure mahazar in the presence of independent witnesses. This witness also stated that further enquiry revealed that the contraband articles were kept for sale. He also stated that four bottles of contraband articles were taken as samples and sent for chemical analysis. PW.4 further stated that he arrested the appellant at the

scene of occurrence, registered Crime No.156 of 1997 and produced him before the Magistrate's Court on 19.6.1997.

6. PW.1 who had accompanied PW.4 deposed that he found the appellant standing with a plastic bag 50 metres away from Parappur junction. He also deposed about the seizure of the contraband articles and identified the appellant as the person form whom the contraband articles were seized. PW.1 also stated that he identified the appellant with the aid of a torch kept by PW.4.

7. PWs.2 and 3 were independent witnesses who had attested Ext.P1 seizure mahazar. They did not support the prosecution case at all even though they admitted their signature in Ext.P1 mahazar. PWs.2 and 3 also deposed that the contraband articles were seized from the back of the shop of PW.3. According to these witnesses, they signed Ext.P1 at the request of the police.

8. The trial court relied on the evidence of PWs.1 and 4 to prove the case against the appellant. PW.5 was the Assistant Sub Inspector of Police of Peramangalam Police Station who conducted the investigation and prepared Ext.P5 scene mahazar.

9. There appears to be some difference in the place of occurrence described in Ext.P1 seizure mahazar and Ext.P5 scene mahazar. As per Ext.P1 seizure mahazar prepared by PW.4, the appellant was found standing at a distance of 50 metres north-west of shop No.409 in Ward No.VI of Tholur Panchayat. As per Ext.P5 scene mahazar prepared by PW.5, the appellant was found standing about 40 metres south - west of Parappur junction and about 10.64 meters north of shop No.409 in Ward No.VI of Tholur Panchayat. DW.1 who was examined on the side of the defence deposed that the place of occurrence was on the east of Parappur centre. Hence, there exists doubt regarding the place of occurrence and the place from where the appellant was arrested. There is also a contradiction in the evidence of PWs.1 and 4 with regard to identification. PW.1 deposed that he identified the appellant with the aid of the torch kept by PW.4 whereas PW.4 has no such case. Further, PWs.1 and 4 have not given any evidence to show that the appellant kept the contraband articles for sale so as to attract Section 55(i) of the Abkari Act. On this aspect, the trial court relied on the presumption available under Section 64 of the Abkari Act. The total quantity of contraband articles seized from the appellant would come to 1 litre and 980 ml. As per the provisions of the Abkari Act and the Rules framed thereunder, a person can keep 1.5 litres of Indian made foreign liquor. Hence, only on the ground on this slight excess quantity, the presumption drawn by the trial court is not justifiable.

Now, it is reported before this Court that as per the subsequent amendment dated 5.2.1999, the total quantity of Indian made foreign liquor that can be kept by a person is raised to 3 litres. The said amendment is after the detection of the offence. The trial court ought not to have drawn a presumption in favour of the prosecution unless the prosecution had adduced positive evidence to show that the contraband articles kept by the appellant were for sale, especially when there was discrepancy in the place of occurrence and the place of arrest. It is the duty of the prosecution to discharge its primary burden of proving that the contraband articles were kept by the appellant for sale.

10. The next point to be considered is whether the prosecution succeeded in proving the offence against the appellant under Section 55(a) of the Act. Even if the prosecution evidence is accepted, the appellant was found in possession of the contraband articles not in the course of import, export, transport or transit. This point was considered by this Court in the decision reported **in Purushan v. State of Kerala, 2002(2)K.L.T. 661** and by a Division Bench of this Court in the decision reported in **Surendran v. Excise Inspectror, 2004(1)K.L.T. 404**. In the above two decisions, this Court had categorically held that unless the prosecution proved that the accused was found in possession of illicit liquor in course of import , export, transport or transit, an offence under Section 55(a) will not be

attracted and at the most, an offence under Section 58 can be construed. The same view was followed by this Court in the decision reported in **Sudhepan @ Aniyan v. State of Kerala, 2005(2)K.L.D.(Cri.) 631**.

11. In the light of the dictum laid down in the decisions referred to above, this Court is of the view that there was no evidence before the court below to hold that the appellant committed offence punishable under Section 55(a) of the Abkari Act. On the basis of the findings entered by this Court, the conviction and sentence ordered against the appellant under Section 55(a) and (i) of the Abkari Act in S.C.No.64 of 2000 on the file of the III Additional Sessions Court (Adhoc) Fast Track Court No.I, Thrissur are set aside and the appellant is acquitted. His bail bonds shall stand cancelled.

The Crl. Appeal is allowed as above.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A.NO.665/2002

JUDGMENT

1ST DECEMBER, 2006.